Supreme Court, U.S.
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No. 87-1193

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE MIAMI HERALD PUBLISHING COMPANY,
Petitioner,

vs.

THE HONORABLE WILLIAM CARTER GRIDLEY, PAULA HAWKINS, W.E. HAWKINS, COWLES BROADCASTING, INC., and CHANNEL TWO TELEVISION COMPANY OF FLORIDA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

Petitioner The Miami Herald Publishing Company files this reply to Respondents' Paula Hawkins and W.E. Hawkins Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida.

I.

Hawkins' first and primary contention is that this Court's denial of certiorari in *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla.), *cert. denied*, 108 S.Ct. 346 (1987), mandates the denial of the petition in this case.

According to Hawkins, the issues and the petitions filed in each case are "identical" and thus the denial in the *Burk* case requires the same denial in this case. Moreover, Hawkins asserts, the recent denial of certiorari in *Burk* renders the instant petition so clearly "frivolous" on its face that The Miami Herald should be required to pay Hawkins damages for having filed it.[1]

These claims are without merit. First, the petition in this case and the *Burk* petition are not identical. This case, unlike *Burk*, raises the issue of public access to unfiled *civil* discovery materials. This issue is of nationwide concern because the civil discovery procedure is employed in state and federal courts across the country. Accordingly, there is a particularly urgent need for the Court's guidance on this issue. In contrast, *Burk* raised the issue of public access to unfiled *criminal* deposition transcripts, an issue of more limited interest because few states employ an expansive deposition procedure in criminal cases.[2] The opinion of the Florida Supreme Court below is clearly a significant *extension* of that court's *Burk* holding based on this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), which merits this Court's review.

Second, and contrary to Hawkins' claim, the law governing access to discovery materials has continued to

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1. Counsel for Hawkins includes his letter to counsel for petitioner asking that the petition be withdrawn in his Appendix. He fails, however, to include The Miami Herald's response. That response is included in the Appendix to this reply, consecutively numbered as A43-A45.

2. Although most states follow the liberal federal discovery model in civil cases, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 29 (1984), only six states employ similarly expansive discovery procedures in criminal cases. *See* Fla.R.Crim.P. 3.220; Ind. Code §35-37-4-3; Iowa R.Crim.P. 12; Mo.R.Crim.P. 25.12; N.D.R.Crim.P. 15; N.H. Rev. Stat. Ann. §517:13.

develop since the *Burk* denial.[3] Brief in Opposition at i. The recent decision of the United States District Court for the District of Columbia in *Avirgan v. Hull*, No. 87-252 (D.D.C. Dec. 9, 1987) (available on LEXIS, Genfed library, Dist file), is illustrative. In *Avirgan*, the court denied the motion for protective order of a deponent in a civil case who sought to prohibit the attendance of the press and public at his deposition. As a preliminary matter, the court rejected the plaintiff's request that "all future depositions" in the case be closed, stating

> As the determination of good cause requires consideration of the circumstances regarding the deposition of the individual defendant, plaintiff's motion is appropriately denied despite the burden it might place on the courts.

Id. at 1, n.1. Relying specifically on this Court's decision in *Seattle Times*, the *Avirgan* court held that the "good cause" standard embodied in the rules of procedure and applied case by case "balances the governmental and first amendment interests at stake when a party seeks to disseminate information obtained through pretrial discovery." *Id.* at 2 (citations omitted). The court defined "good cause" in this context as "specific facts showing 'clearly defined and serious injury' resulting from the discovery sought." *Id.*

In contrast to the *Avirgan* court, the Florida Supreme Court required no showing of good cause for closure and permitted all discovery proceedings to be sealed without a case by case evaluation of the need for closure. *Avirgan*

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3. It should also be noted that there were only eight Justices on the Court when certiorari was denied in *Burk*. As of this writing, there is again a full complement of nine Justices on the Court.

v. Hull is thus clearly in direct conflict with the decision below.

Third, it has long been recognized that a denial of certiorari has no precedential value. As this Court has consistently stated, "[t]he denial of a writ of certiorari imparts no expression upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490 (1923). "Writs of certiorari are a matter of grace. Matters relevant to the exercise of [the Court's] certiorari jurisdiction frequently result in denials of the writ without any consideration of the merits." *Wade v. Mayo*, 334 U.S. 672, 680 (1948). Indeed, as Justice Brennan once noted:

> A denial of certiorari is not an affirmance of the state court judgment as some erroneously think. It means only that the petition for review did not get four votes and it means absolutely nothing more. The denial does not mean that the Court agrees with the result reached by the state court or with the state court's decision of the federal question. . . . *The Court may well take the very next case raising the same question and reach a different result on the merits.*

Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. B. A. Q. 393, 402-03 (1960) (emphasis added).

Finally, as to the damages sought by Hawkins pursuant to Rule 49.2, Rules of the Supreme Court of the United States, little need be said.[4] The petition is ob-

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4. Rule 49.2, Rules of the Supreme Court of the United States, has been sparingly employed by this Court. It has been estimated that there have been "less than a dozen reported instances where the Court has used what is now Rule 49.2 to assess damages" since 1803 when the precursor to the rule was first adopted. R. Stern, E. Gressman & S. Shapiro, *Supreme*

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viously not "frivolous." Rather it addresses a substantial federal question—whether the constitutional right of access extends to unfiled discovery materials in civil cases. As demonstrated both in the petition and in this reply, this question is of great public importance. State and federal appellate courts are in conflict and the issue is ripe for this Court's review and resolution.[5]

II.

On the merits of the petition, Hawkins contends that no case recognizes a First Amendment right of access to unfiled civil discovery materials, and, consequently, that no conflict exists which requires this Court's resolution. Hawkins is in error. In fact, as demonstrated in the petition, Petition at 16-17, some seven circuits have relied on this Court's decision in *Seattle Times* to hold that public access to civil discovery materials may be restricted consistent with the First Amendment only if "good cause" for the restriction is shown.

Hawkins mistakenly argues that the cases cited by The Miami Herald which recognize this limited First

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Footnote continued—

Court Practice 635 (6th ed. 1986). Typically the Court has only awarded such damages where a frivolous petition caused some delay which harmed the respondent. Clearly, the petition is not frivolous nor has Hawkins been caused any delay by the petition. *See* Brief in Opposition at 12.

5. The development of the relevant law in Florida reveals the magnitude of the problem. As a direct result of *Burk*, and the Florida Supreme Court's misinterpretation of *Seattle Times*, public access to depositions has been denied where the deponent favors access, *Post-Newsweek Stations, Florida, Inc. v. State*, 510 So.2d 896 (Fla. 1987), where the criminal defendant favors access, *Palm Beach Newspapers, Inc. v. State*, 506 So.2d 1037 (Fla.), *cert. denied*, 108 S.Ct. 346 (1987) and even where the deponent is the elected state attorney testifying in his official capacity. *Miami Herald Publishing Co. v. Hagler*, 506 So.2d 1037 (Fla.), *cert. denied*, 108 S.Ct. 358 (1987).

Amendment right hold, as does the case at bar, that there is *no* First Amendment right of access to the civil discovery process. Brief in Opposition at 6. The actual holdings of the cases belie Hawkins' claim, however. The language of *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986), relied on by Hawkins for this proposition, is typical:

> *Protective discovery orders are subject to first amendment scrutiny,* but that scrutiny must be made within the framework of Rule 26(c)'s requirement of good cause.

Id. at 7 (emphasis added).

The cases relied on by The Miami Herald which adopt and apply the "good cause" standard pursuant to *Seattle Times* and the First Amendment are thus *not*, as Hawkins claims, Brief in Opposition at 10, "to the same effect" as those cases, like the case at bar, which flatly hold there is no access right of any kind to civil discovery. To the contrary, this case and the cases cited by Hawkins, Brief in Opposition at 10, are in clear *conflict* with the "good cause" cases. Brief in Opposition at 6.[6]

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6. *Compare Courier-Journal v. Marshall*, 828 F.2d 361 (6th Cir. 1987) (quoting and applying the *Seattle Times* First Amendment "good cause" analysis to the closure of a deposition but declining to apply the more stringent First Amendment "compelling interest" analysis reserved for trial proceedings); *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987) (recognizing "presumptive right of access to discovery materials" absent "good cause" showing); *In re Alexander Grant & Co. Litigation*, 820 F.2d 352 (11th Cir. 1987) (holding that protective orders are not subject to "heightened" First Amendment scrutiny "if issued upon good cause"); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986) (holding protective orders "subject to First Amendment scrutiny" within framework of "good cause" analysis); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986), *appeal after remand*, 822 F.2d 335 (3d Cir.), *cert.*

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Finally, Hawkins argues that a full First Amendment right of access should not be extended to civil discovery because (1) there is no history of access and (2) access is not essential to the proper functioning of the judicial process. Brief in Opposition at 10. Hawkins is again in error.

As shown in the petition, Petition at 18-22, and below, notwithstanding the dicta in *Seattle Times* and *Gannett Co. v. Depasquale*, 443 U.S. 368 (1979), the civil discovery process in Florida, as elsewhere, has long been open to public scrutiny. The Miami Herald placed before the Florida Supreme Court clear historical evidence of the intent of the drafters of the Federal Rules of Civil Procedure (on which the Florida rules are modeled) gleaned from the notes and records of the drafters and maintained in document repositories around the country.

Footnote continued—

denied, 108 S.Ct. 487 (1987) (remanding for application of *Seattle Times* First Amendment "good cause" analysis to closure of discovery materials rather than more stringent "least restrictive means" analysis); *Worrell Newspapers v. Westhafer*, 739 F.2d 1219, 1223 n.4 (7th Cir. 1984), *aff'd*, 469 U.S. 1200 (1985) (quoting *Seattle Times* First Amendment "good cause" analysis); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172-73 (D.C. Cir. 1984) (remanding for application of *Seattle Times* First Amendment "good cause" analysis); *United States v. Smith*, 602 F.Supp. 388 (M.D. Pa. 1985), *aff'd*, 776 F.2d 1104 (3d Cir. 1985) (adopting and applying *Seattle Times* First Amendment "good cause" analysis to bill of particulars deemed criminal discovery material); *State v. Cianci*, 496 A.2d 139, 144-45 (R.I. 1985) (recognizing a First Amendment right of access to discovery materials produced in a state criminal prosecution) *with Booth Newspapers, Inc. v. Midland Circuit Judge*, 377 N.W. 2d 868 (Mich. Ct.App. 1985), *leave to appeal denied*, 425 Mich. 854 (Mich. 1986), *cert. denied*, 107 S.Ct. 877 (1987) (public has no standing to seek access to unfiled discovery materials); *Lewis R. Pyle Memorial Hospital v. Superior Court*, 149 Ariz. 193, 717 P.2d 872 (1986) (public has no right of access to unfiled discovery materials); *Oklahoma Hospital Association v. Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985) (public has no standing to seek access to unfiled discovery materials).

This evidence demonstrated that the drafters presumed that the public would be permitted access to depositions and that the protective order mechanism was developed to respond to this eventuality.[7]

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7. Public access to the discovery process was explicitly addressed by the committee selected to draft the modern federal rules:

> Mr. Sunderland. The particular difficulty you suggested, Senator, by way of publicity as a result of the discovery examination, is one that does not actually occur very often, but I think it should be provided against by a rule that upon the request of either party the officer taking the deposition should exclude from the room where the deposition is being taken all persons not immediately concerned with the taking of it.
>
> Mr. Pepper. Our judges would never make a rule like that.
>
> Mr. Morgan. Is not the protection the one Judge Olney spoke of? If the questions are impertinent and do not relate to the merits, if it is the adverse party counsel will tell him not to answer, and then the only way you can determine whether or not he has to answer by an application to the court for an order to compel him to answer. Then the whole thing will be threshed out before the court, and no answer will be given until the court orders him to answer. There the whole thing can be handled that way to protect against abuse. Certainly if I were appearing for an adverse party he would not answer if the questions got out of bounds, until the court told him he had to.
>
> Mr. Pepper. Of course, there is a lot in that. It is all a question of whether the thing is going to work out happily and decently, and in sportsmanlike fashion, the way it evidently does in California, or whether it is going to work out along such lines as I perhaps mistakenly apprehend.
>
> But if it works out the way I venture to apprehend, the publicity is: "Important Question Asked of President of X.Y.Z. Company. Corporation Attorney Instructs Witness Not to Answer."
>
> Where are the liberties of the citizen, and all that? That is what you get in the newspaper the next day, and it is a lot worse than if you answered, because the question might be susceptible of being answered No.

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The *Gannett* dicta repeated in *Seattle Times* and relied on by Hawkins, although to the contrary, is not dispositive. "[*S*]*tare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history." *Wallace v. Jaffree,* 105 S.Ct. 2479, 2512 (1985) (Rehnquist, J., dissenting). The repetition of the historical error made in *Gannett* "does not make it any sounder historically." *Id.* The historical *evidence* provides the controlling authority on this issue, and that evidence demonstrates that discovery was intended to be and long has been presumptively public, both in the federal courts and in Florida, where the tradition of access dates back to the inception of the discovery rules and was only brought to a close by *Burk* and the decision under review.

There are sound reasons that the discovery process should be open to public view.[8] The discovery process now serves much the same function that trial serves. Indeed, because so few cases now culminate in trial, discovery is typically the only opportunity for the public to scrutinize the process of civil justice, a fact Hawkins does not deny. This case is a good example. As Hawkins notes, her personal injury lawsuit was ultimately settled.

Footnote continued—

> Mr. Dodge. I am not accustomed to having depositions taken in public.
>
> Mr. Pepper. They always are with us.
>
> The Chairman. Is that not a Constitutional requirement?

Minutes of Advisory Committee on Rules of Civil Procedure (Feb. 22, 1936).

8. As Judge Wisdom noted in *Wilk v. American Medical Association,* 635 F.2d 1295, 1299 (7th Cir. 1980):

> [I]n addition to the abstract virtues of sunlight as a disinfectant, access [to pretrial discovery] materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process.

The litigation ended without ever coming under public scrutiny. The Miami Herald does not seek to "make the courts a tool for information gathering." Brief in Opposition at 11. The fact is that the courts belong to the public and the public has the right to know how the courts are being used and how their elected officials are being treated by the courts. That right should not depend on a litigant's individual decision to file the information he learns through court-sanctioned discovery.

CONCLUSION

Petitioner The Miami Herald Publishing Company respectfully requests that the Petition for Writ of Certiorari be granted and Hawkins' request for damages be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petitioner's Reply Brief was served March 10, 1988, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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I further certify that all parties required to be served have been served.

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APPENDIX

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February 10, 1988

HAND DELIVERED

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RE: The Miami Herald Publishing Co.
v. Gridley Case No. 87-1193

Dear Mr. Stewart:

We are in receipt of your letter of this date. The Miami Herald will not withdraw the petition. There are several reasons.

First, you should note that since 1803 when the precursor to Rule 49.2 was adopted, there have probably been "less than a dozen reported instances where the Court has used what is now Rule 49.2 to assess damages." Stern, Gressman & Shapiro, *Supreme Court Practice* 635

(6th Ed. 1986). Further, the Court has only awarded damages where frivolous petitions have harmed the respondent because of the resulting delay. *See, e.g., Deming v. Carlisle Packing Co.*, 226 U.S. 102, 110 (1912). Certainly, this petition has caused your client no harm or delay.

Second, the petition is not "frivolous." A "frivolous" petition is one which does not address a substantial federal question. The question addressed in this petition—the scope of the constitutional right of access and its application to unfiled discovery materials in civil cases—is of great public importance. State and federal appellate courts are in conflict on the issue and we believe the issue is ripe for United States Supreme Court review.

Third, your assumption that the petition filed by The Miami Herald in this case is identical to the one filed in *Palm Beach Newspapers, Inc. v. Burk* is simply incorrect. *Burk* was a criminal case and the only issue presented was whether the constitutional right of access extended to unfiled deposition transcripts in criminal cases. This is a civil case and the issue presented, although related, differs significantly from the issue briefed in *Burk*. Further, this case raises the additional question of whether the constitutional right of access extends to *civil* proceedings. As noted in the petition, the United States Supreme Court has not yet explicitly held that the access right extends to civil proceedings.

Finally, a denial of certiorari is not a decision on the merits of the petition. *E.g., United States v. Carver*, 260 U.S. 482, 490 (1923); *accord Wade v. Mayo*, 334 U.S. 672, 680 (1948). The Court did not state its reason for denying the petition in *Burk*. Accordingly, you cannot

assume that the Court would deny the petition in this case simply because it denied the petition in *Burk*. Similarly, the fact that The Miami Herald made certain arguments in the *Burk* petition does not bar it from making those arguments in this case nor does the Court's denial of certiorari mean that those arguments are "frivolous."

For these reasons and many more, The Miami Herald will not withdraw the petition.

Very truly yours,

/s/ Laura Besvinick
Laura Besvinick

LB/jl

cc: Richard J. Ovelmen, Esq.
Gerald B. Cope, Jr., Esq.